

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JERRY RAY DEMOREST,

Defendant-Appellee.

UNPUBLISHED

May 3, 2011

No. 296118

Wayne Circuit Court

LC No. 08-013532-01-FC

Before: WILDER, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

A jury convicted defendant of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(h). The trial court granted defendant's motion for a new trial, and the prosecutor appeals the trial court's order. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEEDINGS

The prosecutor charged defendant with six counts of first-degree criminal sexual conduct for alleged sexual assaults involving his 38-year-old daughter Mandy. Mandy lived with her step-aunt, Rosemary Fruit, and Rosemary's husband, Larry Fruit. Mrs. Fruit testified that Mandy is "mentally retarded". Defendant is Mandy's biological father, but he only began to spend time alone with Mandy in August 2007, after Mandy's step-father died. Mandy's biological mother died in 1997 or 1998. The record reflects that Mandy would call defendant and ask him to spend time with her and he would take her out for an activity or to buy her video games. The prosecutor presented no physical evidence or corroborating witness testimony that defendant sexually assaulted Mandy, and Mandy gave inconsistent statements about the number of alleged assaults, what occurred during the assaults, when they occurred, where they occurred, and when she disclosed the incidents. The charging information originally identified the date of the sexual assaults as May 21, 2008. Later, the prosecutor moved to amend the information to encompass a two-month period, and then amended the information again to designate that the assaults occurred some time during a nine-month period. Defendant, who was 65 years old at the time of trial, denied that he had any sexual contact with Mandy.

After he was convicted of one count of first-degree criminal sexual conduct, defendant filed a motion for a new trial. Defendant argued that the verdict was against the great weight of the evidence and that he received ineffective assistance of counsel. The trial court held an

evidentiary hearing and, thereafter, issued an opinion and order that granted defendant's motion on both grounds.

II. GREAT WEIGHT OF THE EVIDENCE

The prosecutor argues that the trial court erroneously ruled that the verdict was against the great weight of the evidence. Defendant was convicted of first-degree criminal sexual conduct pursuant to 750.520b(1)(h), which provides:

(1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

(h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:

(i) The actor is related to the victim by blood or affinity to the fourth degree.

As this Court explained in *People v Lacalamita*, 286 Mich App 467, 469-470; 780 NW2d 311 (2009):

We review for an abuse of discretion a trial court's grant or denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). Generally, a verdict may be vacated only when the evidence does not reasonably support it and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence. *People v Plummer*, 229 Mich App 293, 306; 581 NW2d 753 (1998). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). Further, the resolution of credibility questions is within the exclusive province of the jury. *People v DeLisle*, 202 Mich App 658, 662; 509 NW2d 885 (1993).

In support of its finding that the verdict was against the great weight of the evidence, the trial court cited Mandy's inconsistent and uncorroborated testimony, evidence of her past untruthfulness, her anger at defendant, her lack of credibility, and the failure to present certain evidence regarding Mandy's mental disorders. We hold that the trial court erred by considering

evidence presented during the post-trial evidentiary hearing to decide that the jury reached the wrong verdict. Logically speaking, the verdict could not have been against the great weight of the evidence if the evidence cited by the trial court was simply not presented to the jury. No evidence was presented to the jury about Mandy's depression and other instances of her being untruthful while in school, working at Meijer's, or in talking to her psychologist. This cannot be the basis for finding the verdict contrary to the evidence because the jury never heard that evidence at all.

Moreover, though we are also troubled by the numerous inconsistencies in Mandy's testimony, the trial court erroneously granted a new trial because Mandy's testimony was uncorroborated by other witnesses or by scientific or medical evidence. By statute, MCL 750.520h, "[t]he testimony of a victim need not be corroborated in prosecutions under [MCL 750.520b(1)(h)]." See also, *People v Szalma*, 487 Mich 708, 724; 790 NW2d 662 (2010). Moreover, "[t]he credibility of witnesses and the weight accorded to evidence are questions for the jury" *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). Accordingly, though Mandy's recollection of when the alleged assaults occurred, where they occurred, and what actually occurred was erratic, this was an issue for the jury to decide and the prosecutor was not required to also submit evidence to corroborate her testimony. Similarly, because it was an issue for the jury, the trial court's conclusion that Mandy's testimony lacked credibility was simply improper. A trial judge may not sit as a thirteenth juror and evaluate the credibility of the testimony to determine that she disbelieves the prevailing party. *Lemmon*, 456 Mich at 636. " 'As the trier of fact, the jury is the final judge of credibility.' " *Id.*, quoting *People v Johnson*, 397 Mich 686, 687; 246 NW2d 836 (1976). Moreover, while it is clear that the trial court was persuaded that Mandy had a motive to fabricate her claims against defendant, this also was clearly within the province of the jury.

Because the trial court's determination that the verdict was against the great weight of the evidence was based on facts that were not presented to the jury at trial and on motive and credibility determinations that were for the jury to decide, the trial court abused its discretion when it granted a new trial to defendant on this basis.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

The prosecutor contends that the trial court erred when it found that defendant was denied the effective assistance of counsel because defendant failed to establish that he was prejudiced by counsel's errors. As this Court recently explained in *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010):

The right to counsel guaranteed by the United States and Michigan constitutions, US Const, Am VI; Const 1963, art 1, § 20, includes the right to the effective assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039, 80 L Ed2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). To prove a claim of ineffective assistance of counsel, a

defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

“ ‘A claim of ineffective assistance of counsel is a mixed question of law and fact. A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo.’ ” *Id.*, quoting *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008) (citation omitted).

We hold that the trial court correctly granted a new trial to defendant because, but for counsel's errors, there is a reasonable probability that the jury verdict after trial would have been different.

B. FAILURE TO INVESTIGATE AND INTRODUCE EVIDENCE REGARDING PAST UNTRUTHFULNESS

The record of the evidentiary hearing reflects that defense counsel, Kevin Stoner, had little experience handling criminal trials and had acted as counsel in only one felony jury trial before this one, involving a charge of operating a motor vehicle under the influence of liquor, third offense. However, “[i]nexperience alone is not enough to conclude that a defense counsel acted deficiently or in a manner that prejudiced the defendant.” *People v Kevorkian*, 248 Mich App 373, 415; 639 NW2d 291 (2001). That said, defendant took the position in the trial court that Stoner's inexperience, his limited time to prepare, and his failure to adequately prepare and investigate rendered him ineffective. Stoner was hired by Ronald Gold Law Offices on January 19, 2009, and he spoke very briefly to the lawyer handling defendant's case, Joseph Casteel, before he took over the file. Stoner recalled that he first spoke to defendant about 19 days before trial which began on February 9, 2009. Stoner testified that he met with defendant approximately four times and talked to him on the telephone a couple of times before trial began. Stoner did not seek a continuance to better prepare for the trial, because he believed he was prepared on the date set for trial.

Stoner did not file any pretrial motions and his first in-court appearance for the case was on the day of trial. He also did not interview witnesses other than defendant and his girlfriend before trial, though he knew that defendant had only begun spending time with Mandy in the middle of 2007 and would not know about her prior behavior that would aid in a defense. This Court has stated:

Even the failure to interview witnesses does not itself establish inadequate preparation. *People v Alcorta*, 147 Mich App 326; 383 NW2d 182 (1985). It must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused. *People v Johnson (After Remand)*, 125 Mich App 76; 336 NW2d 7 (1983). [*People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990).]

Stoner did not interview Larry or Rosemary Fruit, though he knew they would be testifying at trial, and he did not interview Mandy's cousin and next door neighbor, Mary Jo Varot, with

whom Mandy discussed the alleged assaults. Stoner did not interview the doctor who examined Mandy after the assaults, nor did he interview the psychologist who examined Mandy prior to her accusations. Stoner also was aware that Mandy told police that the second alleged assault occurred when defendant took her to his mother's house in Plymouth. This was contrary to Mandy's trial testimony and her testimony at the preliminary examination, but Stoner did not raise this issue, interview defendant's mother, or call her as a witness.

Stoner did not subpoena defendant's medical records and he claims not to have seen them, though defendant's longtime girlfriend, Suzette Hurd, said she gave them to defense counsel. Despite information that defendant had a heart attack in late 2007 and had back problems, Stoner did not talk to defendant's doctors or to defendant about his ability or inability to engage in sexual activity. Stoner also did not talk to an expert about Mandy's mental disability and whether it would effect her memory, veracity or competency, and he did not speak to any police officers involved in the investigation.

The trial court based its ruling, in part, on Stoner's failure to investigate or introduce evidence regarding Mandy's history of lying. Stoner testified at the evidentiary hearing that one part of his three-part strategy was to show that Mandy tended to lie. He further testified that he believed the best evidence of Mandy's untruthfulness was Larry Fruit's testimony that, at first, he did not believe Mandy's claim that defendant sexually assaulted her because she had lied in the past. Evidence also showed that Mandy did not appear upset after her visits with defendant and continued to want to see defendant, despite her later allegations of sexual assault. With regard to his statement that Mandy had lied in the past, Mr. Fruit clarified during his testimony that Mandy's history of lying only related to small household matters, like failing to admit she took something from a cupboard. The prosecutor specifically asked Mr. Fruit whether Mandy had lied in the past about being raped and he replied that she had not. Stoner did not object to the question or answer. Had Stoner interviewed Mr. Fruit before trial, he may have learned that the basis for his statement about Mandy's lack of truthfulness did not concern any significant matters. Further, Stoner should have objected to the prosecutor's question because Mr. Fruit lived with Mandy for a relatively brief period of time and would lack knowledge about whether she had ever lied in the past about being raped.

Stoner testified that he intentionally declined to present evidence that Mandy lied when she accused a fellow Meijer employee of punching her at work and stealing from a cash register. Stoner reasoned that the incident occurred several years before the incidents involving defendant, she admitted that she lied about the employee's conduct, and her accusation had nothing to do with a sexual assault. This Court does not second-guess matters of trial strategy. *Unger*, 278 Mich App at 242-243. We note, however, that Stoner failed to recognize that Mandy made an identical allegation at Meijer and in this case. She alleged that the Meijer employee called her a "bitch" and a "retard" and, here, though she testified that defendant was almost totally silent before, during, and after the assaults, she told the police detective that defendant called her a "bitch" and a "retard" during one of the assaults.

Also on the issue of Mandy's tendency to lie, Stoner failed to subpoena Mandy's school records, which indicated that Mandy had a habit of lying to get others in trouble. The records also indicate that Mandy claimed she was abused at home, but she later changed parts of her story and recanted. Thus, Mandy made another allegation of abuse by a family member in the

past and it turned out to be false. Through his lack of investigation, Stoner failed to uncover this evidence, which would have served to establish a defense of fabrication that clearly was not otherwise established through the testimony of Mr. Fruit.

Stoner also failed to interview or subpoena the records of Dr. Vanita Sharma, the OB/GYN who examined Mandy on July 23, 2008. Mandy testified that she went to the doctor because of defendant's assault and that she did so before she talked to the police. It appears that, in fact, Mandy simply went to her annual examination with Dr. Sharma a month-and-a-half after the alleged assaults. While Stoner denied the significance of this at the evidentiary hearing, this would arguably constitute another example of untruthfulness by Mandy about which Stoner did not know because he failed to investigate the matter.

Mandy told a psychologist during her psychological examination that she had a boyfriend but, at the preliminary examination, she denied that she had a boyfriend and denied ever telling anyone that she did. At some point, therefore, Mandy was untruthful about the existence of a boyfriend. Stoner testified that he did not introduce this evidence to the jury because he did not consider it to be a significant inconsistency. Finally, Stoner did not introduce evidence that Mandy told a psychologist that she lived with defendant for a year and that he took drugs and drank alcohol while working for the railroad. At the evidentiary hearing, defendant asserted that this was a lie because Mandy never lived with him and he was regularly tested for drugs and alcohol by his employer, CSX Railroad. Stoner did not testify about why he failed to introduce this evidence.

In light of Stoner's asserted strategy to show Mandy's history of lying, his failure to introduce other evidence of the lies about which he was aware was unreasonable and so was his failure to interview Mr. Fruit and investigate other records. In a case in which the only evidence against the defendant is significantly inconsistent and confusing testimony from a single witness, it was unreasonable to fail to recognize, investigate, or pursue these issues at trial while claiming to rely on a defense of fabrication. In brief, when guilt rests solely on the credibility of competing and conflicting stories of complainant and defendant, the complainant's credibility takes on added significance.

C. DEFENDANT'S MEDICAL HISTORY

The trial court based its grant of a new trial, in part, on Stoner's failure to review defendant's medical records and to present evidence of his physical condition. Suzette Hurd and defendant both testified at the evidentiary hearing that they did not engage in sexual intercourse in 2008 because of defendant's heart attack in late 2007 and his other physical limitations. According to defendant, in addition to his heart attack in 2007, he had urethral surgery in 2008, he suffered from urethral stricture disease, he underwent numerous back surgeries in 2003, and had a quintuple bypass in 1992. Hurd testified that defendant's physical condition was such that, if he climbed the stairs, he would have to rest before coming back down the stairs and defendant testified that he was too scared to have sexual intercourse because of his physical condition. Hurd also testified that she gave defense counsel a copy of defendant's medical records.

Stoner testified that he was aware that defendant had a heart attack in late 2007 and that he had acid reflux, but he was not aware of his other physical ailments, his history of bypass

surgery, multiple back surgeries, urethral stricture disease and urethral surgeries. Stoner did not subpoena defendant's medical records and claims he did not have them, despite Hurd's assertion that she submitted them. Stoner testified that he did not discuss defendant's medical problems with defendant other than, perhaps, one question about his health. Stoner did not discuss with defendant, an expert, or any of defendant's doctors, whether his physical problems might make sexual activity difficult or impossible. Instead, Stoner ignored the issue because he learned that police found Viagra in defendant's home. Stoner recalled that defendant said his doctor prescribed the Viagra and, on that basis, it appears Stoner assumed defendant was capable of engaging in sexual intercourse and did not pursue any defense on this issue. At trial, the prosecutor pointed out that Viagra was found in defendant's home, and no evidence was offered to rebut the implication that defendant was capable of engaging in sexual intercourse.

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. [*Strickland v Wash*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984).]

If Stoner reviewed the medical records submitted by Ms. Hurd or if he subpoenaed those records, talked to defendant or his doctors, or otherwise investigated the issue, he could have established defendant's physical condition made it difficult or highly unlikely that he would engage sexual intercourse, and this would have constituted a substantial, viable defense to Mandy's allegations of multiple acts of sexual conduct. A failure to introduce evidence may constitute ineffective assistance of counsel if it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). And, though a failure to investigate may be justified if it seems reasonable under the circumstances, *Strickland*, 466 US at 690-691, it was not reasonable for Stoner to ignore these issues or fail to investigate them based on the mere existence of a bottle of Viagra in defendant's home.

D. MANDY'S MENTAL DISABILITY

The trial court found Stoner to be ineffective because he lacked knowledge about and failed to investigate issues regarding Mandy's mental disability. As an element of the offense of first-degree CSC, the prosecutor was required to prove that Mandy was "mentally incapable, mentally disabled, mentally incapacitated, or physically helpless" MCL 750.520b(1)(h). "Mentally disabled" is defined by MCL 750.520a(h) to mean "that a person has a mental illness, is mentally retarded, or has a developmental disability." MCL 750.520a(k) defines "mentally retarded" as "significantly subaverage general intellectual functioning that originates during the developmental period and is associated with impairment in adaptive behavior."

The prosecutor established Mandy's mental disability through the testimony of Rosemary Fruit, who testified that Mandy has an I.Q. of 69, and was diagnosed as moderately mentally

retarded. However, the prosecutor did not establish that this originated “during the developmental period.” Mandy also testified about her mental condition to a very limited extent. Mandy testified that she has a “learning disability” and suffers from emotional mental impairment or “EMI” that was diagnosed when she was 16 years old, which is within “the developmental period.” She also testified that, in school, she took special education classes. However, no evidence established that Mandy’s alleged “learning disability” or her “EMI” rendered her “mentally incapable” or amounts to a “developmental disability” under the statute. Mandy did not testify that she is mentally retarded.

Mrs. Fruit’s testimony about Mandy’s diagnosis of mental retardation constituted hearsay because it was an out-of-court statement offered to prove the matter asserted, that Mandy is mentally disabled. This is as an essential element of MCL 750.520b(1)(h), and Stoner’s failure to object constituted error. Because no other evidence introduced at trial established that Mandy is mentally retarded, this could not constitute harmless error because it was the only evidence of an essential element of the crime. *Payne*, 285 Mich App at 196. Based on the evidence presented by the prosecutor, defense counsel should have objected to the hearsay testimony offered by Mrs. Fruit and, absent further evidence submitted by the prosecutor, should have moved for a directed verdict. Because Mandy’s assertion about her “learning disability” and “EMI” diagnosis was also hearsay, and because no evidence established that “EMI” constitutes a mental disability under MCL 750.520b(1)(h), a directed verdict would likely have been appropriate on this basis. The prosecutor relies on an unpublished opinion, *People v Mueller*, unpublished opinion per curiam of the Court of Appeals, issued June 17, 2004 (Docket No. 247660), to support the position that a parent’s testimony is sufficient evidence of a child’s mental disability. However, the case is inapposite because, here, Rosemary Fruit is not Mandy’s parent and the record reflects that Mandy did not live with Mrs. Fruit for most of her life and was not the person caring for Mandy during her developmental years. Further, the issue of hearsay was not raised in *Mueller* and the panel in *Mueller* also relied on the testimony of a mental health therapist who treated the victim and testified that the victim had the mental capacity of a young child.

At the evidentiary hearing, Stoner testified that Mandy’s mental disability was established by Mrs. Fruit’s testimony regarding her I.Q., and Mandy’s demeanor on the stand. Stoner acknowledged that Mrs. Fruit’s testimony about Mandy’s diagnosis constituted hearsay and conceded that he failed to object. He also testified that he did not know whether “EMI” is a recognized mental disability. Stoner further testified that, though he reviewed Mandy’s psychological evaluation, he did not remember its contents and he conducted no research on Mandy’s alleged mental disability or how it may relate to her ability or tendency to fabricate or lead to other psychiatric problems that would bear on her memory or veracity.

As discussed, there is a reasonable probability that defendant could have been successful in moving for a directed verdict if the hearsay testimony about Mandy’s mental disability were excluded. Stoner did not testify at the evidentiary hearing that he purposely declined to object to the testimony as a matter of trial strategy. Rather, he displayed a general lack of awareness about Mandy’s mental condition and what might constitute a mental disability under the statute and he offered no explanation for failing to challenge the hearsay testimony on the issue. While a failure of trial strategy does not constitute ineffective assistance of counsel, *Kevorkian*, 248 Mich App at 414-415, if the strategy employed by counsel was unreasonable, counsel’s

representation was ineffective. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). Again, it appears that Stoner simply failed to realize the importance of or research any aspect of Mandy's mental disability. A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments." *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004). Stoner did not meet this standard.¹

E. PORNOGRAPHIC TAPE

Though not cited by the trial court, we are further persuaded that Stoner's performance fell below objective standards of reasonableness because he failed to rebut evidence that defendant forced Mandy to watch graphic pornography and, indeed, reinforced Mandy's allegations on this issue. Mandy testified at trial that defendant forced her to watch pornographic tapes while in defendant's bedroom and that he would "play" with himself as they watched. During cross examination, Mandy clarified that it was only one tape that defendant would watch with her and that it was not a rental, but one that defendant had in his home. The only evidence presented regarding defendant's possession of a pornographic video was a tape confiscated by

¹ The trial court also based its finding of ineffective assistance of counsel on Stoner's failure to require the prosecutor to submit a bill of particulars. At the evidentiary hearing, Stoner conceded that he had no idea for what alleged incident of criminal sexual conduct the jury convicted defendant. As noted, the jury acquitted defendant of five of the six charges of criminal sexual conduct, and convicted him of one charge, the date of which is impossible to determine from the record. Stoner acknowledged that the prosecutor twice moved to amend the information to expand the dates of when the criminal sexual conduct allegedly occurred, from May 21, 2008 to May 21-June 2008, and then to August 2007 through May 21, 2008. The record also discloses that, in her statement to police and in her preliminary examination and trial testimony, Mandy inconsistently described the number of incidents that occurred, where they occurred, what occurred during each incident, and when she disclosed the assaults to Mr. Fruit.

With regard to child victims, "[t]ime is not of the essence, nor is it a material element, in criminal sexual conduct cases" *People v Dobek*, 274 Mich App 58, 83; 732 NW2d 546 (2007). Assuming, without deciding, that the same can be said for adult, mentally disabled victims, it was not necessary for the prosecutor to state in the information or establish with precision exactly when the alleged sexual misconduct occurred. An information is not deficient for failing to pinpoint the time of the offense and the prosecutor is only required to indicate "[t]he time of the offense as near as may be." MCL 767.45(1)(b). Stoner could have requested a bill of particulars in an attempt to pinpoint more accurately the claims at issue, but it is apparent from the record that it may have been impossible for the prosecutor to do so. This left defendant in the unenviable position of having to give a general denial for most of the allegations rather than challenging Mandy's testimony by establishing, for example, that he was elsewhere or not with Mandy on a date alleged. Again, however, in light of Mandy's contradictory testimony, it is not clear how the prosecutor could have given more precise information to defendant.

the police from defendant's home. Defendant testified that the tape was 20 years old and that he had no idea what was on the tape. Mandy testified that the tape she viewed with defendant showed men having sex with men, women having sex with women, and men sexually penetrating women. Aside from establishing that it was one tape that Mandy watched with defendant, Stoner cross-examined Mandy on the issue as follows:

Stoner. And you indicated it showed men having sex with men?

Mandy. Yes.

Stoner. And women having sex with women?

Mandy. Yes.

Stoner. And what did it show? I mean, did it show penetration?

Mandy. Yes.

Stoner. It showed penises going in vaginas?

Mandy. Yes.

Stoner. And while this is playing you didn't leave the room or go somewhere else?

Mandy. No.

Stoner. You stayed there on the couch with your dad?

Mandy. Yeah.

Stoner. While he played with himself?

Mandy. Yep.

This ended Stoner's cross-examination of Mandy on the issue. At the evidentiary hearing, Stoner conceded that he never watched the tape confiscated by the police, despite his possession of a police detective's report written that stated that no genitals were shown on the tape. When defendant's attorney at the evidentiary hearing, Craig Daly, asked Stoner why he did not call the police detective to testify or otherwise try to rebut Mandy's assertions, the following exchange occurred:

Daly. Okay. So, you had this report. And did -- after [the prosecutor] called Mandy to the stand, and had her testify to this, you didn't call the Detective in surrebuttal, did you?

Stoner. No, I didn't.

Daly. You didn't. And you didn't try to rebut what she had said, which apparently was not true, based on the investigative report, and the V.C.R. [tape] that they have, correct?

Stoner. Well, that's not necessarily true. I don't know if it was -- that's not the video tape that they -- there, I guess there could have been other video tapes, you know.

Daly. But there were, according to the report, there were other video tapes, but none of them had to do with any sexual activity?

Stoner. Well, what, what I'm saying is, video tapes that perhaps he didn't own at, you know, or that weren't recovered. They confiscated video tapes, yeah, video tapes, that didn't described what Mandy talked about.

Daly. Well, was there any evidence that he had gone and rented other sex tapes, to your knowledge?

Stoner. Other than -- not -- Mandy didn't testify or ever said they went to a video store, I believe, although I can't be a hundred percent sure on that.

Thus, rather than rebut Mandy's assertions about what she allegedly saw on the only tape alleged to contain possible sexual activity, Stoner elicited testimony from Mandy that simply repeated her assertions that the tape showed acts of sexual intercourse between multiple people. Stoner appears to have taken the position at the evidentiary hearing that he did not pursue the matter because other tapes could have existed. However, the record contains no evidence that there were any other tapes that could have shown sexual activity. This was not a strategic decision, but a lack of knowledge based on a failure to investigate the matter. Stoner had Mandy repeat her prior testimony about what was on the tape without challenge. Had Stoner seen the tape or called the officer to testify that it did not contain the things alleged by Mandy, it would have shown that Mandy lied about the tape, which would have bolstered defendant's defense of fabrication.

F. MANDY'S DEPRESSIVE DISORDER

The trial court ruled that Stoner was ineffective for failing to present evidence that Mandy suffers from depression. Rosemary Fruit testified at trial that, after the alleged assault, Mandy became withdrawn, she cried more, and spent more time sleeping and down the basement. This alerted the jury to a change of conduct suggesting that Mandy went through a traumatic experience. At the evidentiary hearing, Stoner acknowledged that, several weeks before Mandy made her allegations against defendant, a psychologist stated that Mandy was suffering from depression related to the loss of her mother and step-father which caused depressive symptoms, including a tendency to cry at night. At that time, Mandy also reported that she suffered from hypersomnia (excessive sleepiness), which was likely related to her depression. However, Stoner testified that he did not believe it was significant to point out that Mandy's depression might have caused the change in behavior observed by Mrs. Fruit. However, the failure to raise this issue allowed the prosecutor to suggest that defendant's sexual

assaults caused Mandy's change in behavior, rather than establishing that Mandy suffered from a depressive disorder that explained her altered behavior.

G. CUMULATIVE EFFECT OF COUNSEL'S ERRORS

Even if an individual error of counsel cannot be shown to have prejudiced defendant, "[t]he cumulative effect of several minor errors can warrant reversal" *Unger*, 278 Mich App at 258. As noted, Stoner's failure to investigate and present evidence regarding defendant's medical condition deprived defendant of a substantial defense. As also noted, Stoner's failure to interview witnesses, subpoena records, and present evidence of Mandy's prior incidents of untruthfulness seriously undermined the defense of fabrication in this case. We hold that these errors, along with Stoner's failure to investigate, research, or challenge evidence regarding Mandy's mental disability and depressive disorder, and his failure to investigate and present evidence regarding the other matters discussed in this opinion, denied defendant effective assistance of counsel and, consequently, a fair trial. Absent counsel's cumulative errors, there is a reasonable probability that the jury would have found defendant not guilty and the errors seriously undermined the integrity of the proceedings. In so holding, we are mindful that "the effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). We are also aware that defendant was acquitted of all but one charge. However, there is a reasonable probability, and indeed, we conclude a strong likelihood, that defendant would have been acquitted of all charges had defense counsel investigated and presented the issues discussed above. Importantly, even aside from evidence regarding Mandy's mental disability, acquittal would have been reasonably probable if Stoner had interviewed other witnesses, including Mr. Fruit, to determine the basis for his testimony that Mandy lied in the past, presented other examples of Mandy making false assertions and allegations, investigated and discussed defendant's significant medical history, established that Mandy's assertions about the pornographic tape were untrue, and challenged evidence of Mandy's change in behavior. In a case involving inconsistent accusations by a mentally challenged victim without any other supporting evidence, Stoner's failure to investigate, research and present this evidence seriously undermined the reliability of the verdict. Accordingly, we affirm the trial court's decision to grant defendant a new trial.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Pat M. Donofrio